Contracts: Prevention of Performance: Conditions Precedent.[1] — A of said work by any of the causes above named (fire, defective soil, building contract provided that "In the event of a partial destruction earthquake, etc.), then the loss to be sustained by the owner shall be in the proportion that the amounts of installments paid or due bears to the total amount of work done and materials furnished estimated according to said contract price, and the balance of said loss to be sustained by the contractor." On April 18, 1906, the building was partially destroyed by fire and earthquake. The court found that only the first installment of the contract price, to wit, $3049.00, had been paid, and that no further payment was due under the terms of the contract, although the plaintiff had expended $13,279.43 in performing the work. The contractor sued for the value of the work done up to the time of the casualty, and for loss of profits, claiming prevention of performance by the owner. The Supreme Court sustained a finding of the lower court, that there was no prevention of performance under the following state of facts: On July 24, 1906, the plaintiff addressed to the defendant a letter calling attention to the provision above quoted, and requesting the defendant to fix a time before August 1, 1906, when they might meet "and adjust the losses on this building as provided in the foregoing paragraph of the contract." No time for such meeting was fixed by the defendant and in fact no meeting took place. It was held that the contract did not authorize the plaintiff to demand an adjustment before proceeding with his work, nor did it require the owner to pay his proportion of the loss before the work proceeded. Upon reaching a point where a payment was due him the plaintiff could have demanded of the defendant such amount as he could show to be due under the contract.

The appellant contended that the defendant was the actual gainer by reason of the partial destruction of the work, as the result of the decision. In so far as this claim is based upon the fact that the detendant collected insurance, it may be answered that such circumstance was no concern of the plaintiff; on the other hand, if the benefit arose from a salvage on the building, that was wholly because plaintiff did not proceed to complete his contract.

The court did not, and was not required to discuss the interesting question what would be the precise time when the contractor might demand payment of the owner's proportion of the loss. It merely held that such payment was not a condition precedent to finishing the work.

L. H. J.

Constitutional Law: Police Power: City Ordinance: "Municipal Affairs."—Section 11, Article XI, of the Constitution of 1879 reads as follows: "Any county, city, town or township may make and enforce within its limits all such local, police, sanitary, and other regulations

---

[1] Anderson v. Quick, 44 Cal. Dec. 345 (Sept. 6, 1912).

as are not in conflict with general laws." At first glance, the proposition that this section lays down, viz., that the local regulations must be subject to general laws, is qualified by the last clause of Section 6 of the same article, which reads: "and cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, except in municipal affairs, shall be subject to and controlled by general laws." The excepting phrase was inserted by amendment in 1896, and has been considered in some thirty-five cases in the Supreme and Appellate courts since that date.

Obviously the phrase "municipal affairs" is so vague that the impatient expression of judges called upon to apply it are not surprising.[1] In one of the first cases considering it, three concurring opinions define the phrase as, (a) "the internal business affairs of a municipality"; (b) "such affairs only as that municipality has the power to engage in or perform" under "the powers found in its charter," and (c) "any purpose for which cities and towns are organized."[2] The courts have, throughout the series of cases, variously applied one and another of these tests, apparently following in the main the second, which restricts the affairs in which chartered cities shall be free from the control of general laws to matters in which they are by the express terms of their charters permitted to engage.

No cases have arisen in which purely police regulations of a chartered city have been held to amount to "municipal affairs." On the contrary, police regulations have been declared invalid because in conflict with general laws. In one of these cases[3] Section 6 was not considered; in another[4] the decision goes on another point, leaving an inference that internal police ordinances authorized by the city charter may be "municipal affairs"; and the third[5] goes on the ground that an ordinance licensing an act which is a crime under general laws, a crime malum in se, is not authorized by the charter of the city, and so is not a "municipal affair." Most of the decided cases arise under the power of taxation,[6] the use of public money and property[7] and the exercise of purely administrative functions of the city.[8] But it must be recognized that unless the prevailing test of a "municipal affair" as stated above is in the future restricted, the court must logically proceed to the surprising view that a local police ordinance is paramount to a general statute.

In this connection it may be noted that the case of In re Montgomery,[9] was decided under Section 11, Article 11, (supra). An ordi-

---

[1] Ex parte Braun, 141 Cal. 204; 74 Pac. 780 (1904).
[2] Fragley v. Phelan, 126 Cal. 383; 58 Pac. 923 (1899).
[3] In re Desanta, 8 Cal. App. 295; 96 Pac. 1027 (1908).
[4] Ex parte Sweetman, 5 Cal. App. 577; 90 Pac. 1069 (1907).
[5] Farmer v. Behmer, 9 Cal. App. 773; 100 Pac. 1091 (1909).
[6] Ex parte Helm, 143 Cal. 553; 77 Pac. 453 (1904).
[7] Popper v. Broderick, 123 Cal. 456; 56 Pac. 53 (1899); Sunset Tel. & Tel. Co. v. Pasadena, 161 Cal. 265; 118 Pac. 796 (1911).
[8] Morton v. Broderick, 118 Cal. 474; 50 Pac. 644 (1897).
[9] 44 Cal. Dec. 206; 125 Pac. 1070 (August 6, 1912).

nance prohibiting lumber yards within a prescribed residence district in the city of Los Angeles was upheld as a valid exercise of the police power granted directly to all cities by the section referred to. The court does not declare the ordinance to concern a "municipal affair," and as an inference from the current of decisions on the phrase, it would hesitate to do so.

Whether Section 6 is in theory to be accepted as a qualification of Section 11, or vice versa, is too intricate a question, under the existing uncertainty of application of Section 6, to be taken up here.[10]

A. B. S., Jr.

Corporations: Sale of Stock: Recission After Insolvency.—The officers of the defendant bank asked the petitioner and appellant to purchase certain shares of its capital stock, falsely representing to him that the bank was in a flourishing condition. The petitioner, relying upon these statements, purchased 100 shares for $12,000. The bank was, in fact, insolvent at the time of the agreement. The petitioner did not know, nor did he have any means of learning of the fraud, until the bank was adjudged insolvent. He then elected to rescind and notified the receiver. The trial court on demurrer denied appellant's petition of intervention.

On appeal the judgment was reversed,[1] the District Court of Appeal holding that after the adjudication of insolvency the creditors do not have such an interest in the assets as will prevent rescission by a stockholder who has become such by fraud. A petition for hearing in the Supreme Court was denied.

As this is the first time that the question has arisen in California, the court was not bound by any precedent. It is interesting to note that the rule adopted is that followed in the minority of American cases.[2]

The weight of American authority is to the effect that after the adjudication of insolvency the receiver holds the assets as a trust fund for the benefit of creditors.[3] It is to be noticed, however, that in the

---

[10] The "municipal affairs" amendment will be more fully discussed in an article by Professor William Carey Jones in the next number of the California Law Review.

[1] People v. Cal. Safe Deposit & Trust Co. (O. M. Goldaracena, intervening petitioner), (July 12, 1912); 126 Pac. 516; Petition for hearing in Supreme Court denied, 126 Pac. 520 (Sept. 10, 1912).

[2] Newton Bank v. Newbegun, 74 Fed. 135; 33 L. R. A. 727 (1896); Beal v. Dillon, 5 Kans. App. 27; 47 Pac. 317 (1896); Florida Land Co. v. Merrill, 52 Fed. 77 (1892); Stufflebean v. De Lashmut, 83 Fed. 449 (1897); Duffield v. Barnum Wire Co. (dissenting opinion), 64 Mich. 293; 31 N. W. 310 (1887).

[3] Scott v. Latimer, 89 Fed. 843 (1898); Moosbrugger v. Walsh, 35 N. Y. S. 550 (1895); Michener v. Payson, 17 Fed. Cas. No. 9524 (1875); Sanger v. Upton, 91 U. S. 56 (1875); Duffield v. Barnum Wire Co., 64 Mich. 293; 31 N. W. 310 (1887); Upton v. Hansbrough, 28 Fed. Cas. No. 16801; Olive v. Knox Ins. Co., 22 How. 380 (1859).